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Professional Diversity Network, Inc., d/b/a National Association of Professional Women and Jessica Fleischer. Cases 31–CA–159810 and 31–CA–162904

June 7, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA
AND MCFERRAN

The General Counsel seeks a default judgment in this case on the ground that the Respondent has failed to file an answer to the consolidated complaint. Upon charges filed by employee Jessica Fleischer on September 10, and October 29, 2015, the General Counsel issued a complaint on February 29, 2016, against Professional Diversity Network, Inc. d/b/a National Association of Professional Women (the Respondent), alleging that the Respondent has violated Section 8(a)(1) of the National Labor Relations Act. The Respondent failed to file an answer.

On April 13, 2016, the General Counsel filed a Motion for Default Judgment with the Board. Thereafter, on April 15, 2016, the Board issued an Order Transferring Proceeding to the Board and Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively stated that unless an answer was received by March 14, 2016, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. Further, the undisputed allegations in the General Counsel's motion disclose that by letter dated March 31, 2016, the Region advised the Respondent that unless an answer was received by April 8, 2016, a motion for default judgment would be filed. The Respondent again failed to file an answer.

In the absence of good cause being shown for the failure to file an answer, we deem the allegations of the

complaint to be admitted as true, and we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a Delaware corporation with a principal place of business located at 801 W. Adams, Chicago, IL 60607, with a branch office located at 2121 Avenue of the Stars, Suite 2050, Los Angeles, CA 90067 (the facility), and has been engaged in the retail sale of membership and service benefits to women for educational and career purposes.

In conducting its operations during the 12-month period ending October 22, 2015, the Respondent derived gross revenues in excess of \$1 million and purchased materials or services in excess of \$5000 which were furnished to the Respondent at its facility in Los Angeles, California directly from points outside the state of California.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

| | |
|-----------------|-------------------------|
| Jim Kirsch | Chief Executive Officer |
| Katie Maloney | Sales Director |
| Michelle Prasad | Human Resource Manager |

About May 7, 2015, the Respondent's employee Jessica Fleischer concertedly complained to the Respondent regarding the wages, hours, and working conditions of the Respondent's employees, by sending a detailed email to the Respondent's chief executive officer Jim Kirsch expressing the need to better groom, train, and value all employees.

About May 7, 2015, Fleischer engaged in concerted activities with other employees by verbally expressing their mutual disappointment to the Respondent's Sales Director Katie Maloney at a meeting introducing the new "Employee Success Program" that was promulgated because of low employee satisfaction surveys.

About May 13, 2015, Fleischer engaged in concerted activities with other employees for the purposes of mutual aid and protection, by collectively discussing their disappointment with the Respondent's Sales Director Katie Maloney's announcement of revised minimum

sales figures for sales staff for a shortened workday earlier that week.

On about May 13, 2015, Fleischer concertedly complained to the Respondent regarding the wages, hours, and working conditions of the Respondent's employees, by meeting with the Respondent's human resource manager, Michelle Prasad and informing her that there was a growing discontent among the sales staff regarding management's decisions about the minimum sales figures.

On about May 13 and 14, 2015, Fleischer concertedly complained to the Respondent regarding the wages, hours, and working conditions of the Respondent's employees, by meeting with the Respondent's sales Director Katie Maloney and offering alternative minimum sales figures that would be more equitable to all sales staff.

On about May 15, 2015, the Respondent discharged Fleischer.

The Respondent discharged Fleischer because Fleischer engaged in the conduct described above, and to discourage employees from engaging in these or other concerted activities.

Since about May 1, 2015, the Respondent has maintained the following rules in its 2014 Professional Diversity Network Employee Handbook (Section 701):

The following are examples of infractions of rules of conduct that may result in disciplinary action, up to and including termination of employment:

- Boisterous or disruptive activity in the workplace;
- Insubordination or other disrespectful conduct;
- Having a conflict of interest;
- Conduct that reflects adversely upon you, or Professional Diversity Network, Inc.;
- Making or publishing false or malicious statements concerning an employee, supplier, client, or Professional Diversity Network, Inc.;
- Violation of personnel policies; and
- Other circumstances which warrant discipline.

Since about May 1, 2015, the Respondent has maintained the following rule in its 2014 NAPW Handbook (Standards of Conduct):

The following may result in disciplinary action, up to and including discharge: insubordination.

Since about May 1, 2015, the Respondent has maintained the following rule in its 2015 Professional Diversity Network, Code of Conduct and Ethics for Employees, Officers and Directors (Conflicts of Interest):

A conflict of interest can occur or appear to occur in a wide variety of situations. Generally speaking a conflict of interest occurs when an individual's personal interest

(or the interest of a member of his or her family) interferes with, has the potential to interfere with, or appears to interfere with the interests or business of the Company. For example, a conflict of interest could arise that makes it difficult for an employee or director to perform corporate duties objectively and effectively where he/she is involved in a competing interest. Another such conflict may occur where an employee or director (or a member of his or her family) receives a gift, a unique advantage, or an improper personal benefit as a result of the employee's position at the Company. Because a conflict of interest can occur in a variety of situations, you must keep the foregoing general principle in mind in evaluating both your conduct and that of others.

Outside Activities/Employment

Any outside activity, including employment, should not significantly encroach on the time and attention employees and directors devote to their corporate duties, should not adversely affect the quality or quantity of their work, and should not make use of corporate equipment, facilities, or supplies, or imply (without the Company's approval), the Company's sponsorship or support.

Civic/Political Activities

Employees are encouraged to participate in civic, charitable or political activities so long as such participation does not encroach on the time and attention they are expected to devote to their company-related duties. Such activities are to be conducted in a manner that does not involve the Company or its assets or facilities, and does not create an appearance of Company involvement or endorsement.

CONCLUSION OF LAW

By the conduct described above, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act. The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(1) of the Act by discharging Jessica Fleischer, we shall order the

Respondent to offer Fleischer full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed. In addition, we shall order the Respondent to make Fleischer whole for any loss of earnings and other benefits she may have suffered as a result of the Respondent's unlawful actions against her. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).¹ We shall further order the Respondent to compensate Fleischer for any adverse tax consequences of receiving a lump-sum backpay award and to file a report with the Regional Director for Region 31 allocating backpay to the appropriate calendar years. *Advoserv of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

The Respondent additionally shall be required to remove from its files any and all references to Fleischer's unlawful discharge and to notify her in writing that this has been done and that the unlawful conduct will not be used against her in any way.

Further, having found that the Respondent violated Section 8(a)(1) by maintaining overbroad provisions in its 2014 Professional Diversity Network Employee Handbook, its 2014 NAPW Handbook, and its 2015 Professional Diversity Network, Code of Conduct and Ethics for Employees, Officers and Directors, we shall order the Respondent to rescind the unlawful provisions, and advise its employees in writing of such rescission.

ORDER

The National Labor Relations Board orders that the Respondent, Professional Diversity Network, Inc. d/b/a National Association of Professional Women, Chicago, Illinois and Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

¹ In the complaint, the General Counsel requests that Fleischer be reimbursed for all search-for-work and work-related expenses regardless of whether she received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay period. Because the relief sought would involve a change in Board law, we believe that the appropriateness of this proposed remedy should be resolved after a full briefing by the affected parties, and there has been no such briefing in this case. Accordingly, we decline to order this relief at this time. See, e.g., *The H.O.P.E. Program*, 362 NLRB No. 128, slip op. at 2 fn. 1 (2015); *Ishikawa Gasket America, Inc.*, 337 NLRB 175, 176 (2001), enf'd. 354 F.3d 534 (6th Cir. 2004), and cases cited therein.

(a) Discharging employees because they engage in protected concerted activities, and to discourage employees from engaging in these activities.

(b) Maintaining overly broad rules in its 2014 Professional Diversity Network Employee Handbook, 2014 NAPW Handbook, and 2015 Professional Diversity Network, Code of Conduct and Ethics for Employees, Officers and Directors.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Jessica Fleischer full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Jessica Fleischer whole for any loss of earnings or benefits she may have suffered as a result of her unlawful discharge, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Jessica Fleischer, and within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

(d) Compensate Jessica Fleischer for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 31, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Rescind the overly broad rules in its 2014 Professional Diversity Network Employee Handbook.

(g) Rescind the overly broad rule in its 2014 NAPW Handbook.

(h) Rescind the overly broad rule in its 2015 Professional Diversity Network, Code of Conduct and Ethics for Employees, Officers and Directors.

(i) Within 14 days after service by the Region, post at its facilities in Chicago, Illinois, and Los Angeles, Cali-

fornia, copies of the attached notice marked "Appendix".² Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 1, 2015.

(j) Within 21 days after service by the Region, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 7, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discharge you because you engage in protected concerted activities and to discourage you from engaging in these activities.

WE WILL NOT maintain overly broad rules in our 2014 Professional Diversity Network Employee Handbook.

WE WILL NOT maintain overly broad rules in our 2014 NAPW Handbook.

WE WILL NOT maintain overly broad rules in our 2015 Professional Diversity Network, Code of Conduct and Ethics for Employees, Officers and Directors.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Jessica Fleischer full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Jessica Fleischer whole for any loss of earnings and other benefits resulting from her unlawful discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful discharge of Jessica Fleischer and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

WE WILL compensate Jessica Fleischer for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 31, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

WE WILL rescind the overly broad rules in our 2014 Professional Diversity Network Employee Handbook, and after the rescission WE WILL advise you in writing that these rules are no longer being maintained.

WE WILL rescind the overly broad rules in our 2014 NAPW Handbook, and after the rescission WE WILL advise you in writing that these rules are no longer being maintained.

WE WILL rescind the overly broad rules in our 2015 Professional Diversity Network, Code of Conduct and Ethics for Employees, Officers and Directors, and after the rescission WE WILL advise you in writing that these rules are no longer being maintained.

PROFESSIONAL DIVERSITY NETWORK, INC.
D/B/A NATIONAL ASSOCIATION OF
PROFESSIONAL WOMEN

The Board's decision can be found at www.nlrb.gov/case/31-CA-159810 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half St., S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

